U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 08 August 2006

BALCA Case No: **2005-INA-00136**
ETA Case No.: 2002-CA-09537981/JS

In the Matter of:

THE PLANT STAND INC.,
Employer,

on behalf of

VICENTE PACANINS,
Alien.

Appearances: Peter H. Morgan, Jr.
Santa Clarita, California
For the Employer and Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: **Vittone, Burke, and Chapman**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. The Plant Stand Inc. (Employer) filed an application for labor certification on April 4, 2001 on behalf of the above-named Alien pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations (C.F.R.). (AF 13-14).[1] The U.S. Department of Labor Certifying Officer

[1] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal

(CO) denied the labor certification application. The Employer requests review of this denial of the labor certification application pursuant to 20 C.F.R. § 656.26.

BACKGROUND

The Employer filed the application for alien employment certification for the job of Plant Propagator. (AF 28). The Employer received the names of two applicants from the Employment Development Department, U.S. Applicant Garriga and U.S. Applicant Walker. The Employer notified U.S. Applicant Garriga by certified mail on November 26, 2002, to contact the Employer to set up an interview appointment. U.S. Applicant Garriga received the letter on November 27. The Employer telephoned Garriga on December 4, 2002 to schedule an appointment. Garriga seemed confused, and indicated that she would contact the Employer if she was still interested in the job. The applicant did not contact the Employer after that conversation. On November 25, 2002, the Employer contacted U.S. Applicant Walker and left a message on his answering machine to call the Employer's office or fax his resume to the office. Mr. Walker did not contact the Employer in response to that message. (AF 32).

On September 1, 2004, the CO issued a Notice of Findings (NOF) proposing to deny labor certification because the Employer failed to document lawful, job-related reasons for the rejection of U.S. workers in accordance with 20 C.F.R. § 656.21(b)(6). The CO's NOF noted that the California Employment Development Department forwarded to the Employer the resumes of two applicants who responded to the Employer's mandatory advertisement. The Employer asserted that none of the applicants had pursued the job. The CO, however, found that U.S. Applicant Dennis Walker was rejected for not replying to the Employer's telephone message. The CO noted that it was unclear what had happened to U.S. Applicant Walker's resume, and further noted that the Employer could have made a more vigorous attempt to contact the applicant and find out whether or not he was qualified. The CO determined that it was not evident whether the Employer's telephone message identified the advertised position, or made

---

Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

clear that the resume for that position needed to be replaced, or whether the applicant was truly on notice that the message on his answering machine was an attempt to recruit him for the job. According to the CO, it was also unclear whether the applicant received the message given that only one telephone call had been placed. (AF 24-26).

The CO's NOF indicated that the Employer could rebut the findings by documenting in greater detail how the U.S. worker was recruited in good faith during the recruitment period for this application. The CO further directed that the Employer should explain if U.S. Applicant Walker's resume was lost, and if so, what efforts were made to determine whether this applicant was qualified. (AF24-26).

The Employer submitted a rebuttal in response to the NOF. In its rebuttal, the Employer stated that it did not receive U.S. Applicant Walker's resume, and it did not have any evidence of his past experience. The Employer noted that the extent of the message left on Mr. Walker's answering machine was detailed, and the Employer "identified [himself] as the owner of The Plant Stand, Inc., petitioning employer for the job as a 'Plant Propagator,' and that [the Employer] had received the name and telephone number from EDD." (AF18).

The CO issued a Final Determination on October 25, 2004, finding that the Employer remained in violation of 20 C.F.R. § 656.21(b)(6). Consequently, the CO denied the application for alien labor certification. The CO found that it would have been prudent for the Employer to realize that even if U.S. Applicant Walker's resume was somehow lost, more could be done to attempt to obtain the missing information. The CO noted that the Employer did not indicate whether the Employer or its agent called the local employment office to report the lack of a resume for one of the two applicants. The CO further found that the Employer's message left for U.S. Applicant Walker did not indicate that it was calling regarding the advertised position in question, and used the term "petitioning employer" and EDD on the voice message. The CO noted further that there is no indication that a U.S. worker who receives a voice message on an answering machine would know what a "petitioning employer" is or to what "EDD" refers. The CO determined that where only one phone message was left, it may not have been sufficient, as it cannot be assumed that the applicant received the message. (AF 15-17).

The Employer submitted this request for review of the denial to the Board of Alien Labor Certification Appeals (Board) pursuant to 20 C.F.R. § 656.26. The Board docketed the case on May 31, 2005.

DISCUSSION

Under the labor certification regulations, an employer may reject U.S. workers solely for lawful, job-related reasons. 20 C.F.R. § 656.21(b)(6). Here, the CO questioned the manner in which the Employer notified the applicant regarding the position. It is well-settled that the Employer bears the burden of establishing that it has made reasonable efforts to contact qualified workers. *Bay Area Women's Resource Center*, 1988-INA-379 (May 26, 1989) (*en banc*). The Employer's rebuttal does not support the assertion that sufficient attempts were made to contact the applicant and ascertain his qualifications. Indeed, the Employer attempted to contact U.S. Applicant Walker with only one telephone message. Despite the fact that there is no documentation memorializing the details of that message, the Employer made no further attempts—whether by phone, certified mail, or otherwise—to contact the applicant again. Under these circumstances, we conclude that the Employer did not make reasonable good faith efforts to contact the U.S. applicant.

Consequently, the Employer has failed to provide lawful, job-related reasons for rejecting the U.S. workers' applications in violation of Section 656.21(j)(1). Therefore, the CO properly denied certification.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.